Table of Contents

	Page
1. This court should not be asked to undertake to review the concurrent findings of fact by both courts below.....	1
2. The trade mark licenses were found by both courts below to involve illegal tie-ins both on the facts and on the law	2
3. Petitioners' label licenses were found to involve illegal misuse on concurrent findings of fact which were not challenged below	5
4. The defense of patent infringement actions brought in furtherance of an illegal monopoly is compensable as damages without proof of malice or bad faith.....	5

Table of Authorities Cited

	Page
A. Bourjois & Company v. Katzel (1923), 260 U.S. 689	4
Aro Mfg. Co. v. Convertible Top Co. (1961), 365 U.S. 336	5
Clapper v. Original Tractor Cab Company (7th Cir. 1959), 270 F.2d 616	8
Coca-Cola Co. v. J. G. Butler & Sons (E.D.Ark. 1916), 229 Fed. 224	4
Dairy Foods Incorporated v. Dairy-Maid Products Coop. (7th Cir. 1961), 297 F.2d 805	8
Dehydrating Process Co. v. A. O. Smith Corp. (1st Cir. 1961), 292 F.2d 653	4
Graver Mfg. Co. v. Linde Co. (1949), 336 U.S. 271	2
Hartford-Empire Co. v. U. S. (1945), 323 U.S. 386	6
Jerrold Electronics Corp. v. United States (1961), 365 U.S. 567	4
Kobe, Inc. v. Dempsey Pump Co. (10 Cir. 1952), 198 F.2d 416, cert. den. (1952), 344 U.S. 887	7
Mercoid Corp. v. Honeywell Co. (1944), 320 U.S. 680	5
Mercoid Corp. v. Mid-Continent Co. (1944), 320 U.S. 661	5
Northern Pac. R. Co. v. United States (1958), 356 U.S. 1	3
Scandinavia Belting Co. v. Asbestos & Rubber Works of America, Inc. (2d Cir. 1919), 257 Fed. 937	4
Timken Co. v. United States (1951), 341 U.S. 593	4
United States v. Hartford-Empire Co. (N.D. Ohio W.D. 1942), 46 F.Supp. 541	6
United States v. Jerrold Electronics Corporation (E.D.Penn. 1960), 187 F.Supp. 545	4
United States v. Loew's Incorporated (S.D.N.Y. 1960), 189 F.Supp. 373	4

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 759.

SWITZER BROTHERS, INC., ROBERT C. SWITZER, and JOSEPH L. SWITZER,

Petitioners,

v.

HARRY P. LOCKLIN and ELMER J. BRANT, general partners doing business under the firm name of RADIANT COLOR COMPANY,

Respondents.

BRIEF IN OPPOSITION

Respondents oppose the Petition for a Writ of Certiorari filed in No. 759 for the reasons set forth below.[1]

1. The statement of facts is a one-sided argumentative presentation of fact issues which were tried before the District Court upon a voluminous record, composed of testimonial and exhibit evidence (Petition, p. 34).[2] Al-

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[1]For simplicity, the term Switzer is used to identify petitioners individually as well as collectively, and the term Radiant is used to identify respondents individually as well as collectively.

[2]References to the Petition for a Writ of Certiorari as well as to the Appendix to the Petition are Petition p. . References to Appendix throughout this brief refer to "Appendix to Brief of Appellants" filed in the Court of Appeals and transmitted to the Clerk of this Court.

though the Appendix presented by Switzer before the Court of Appeals is composed of skimpy excerpts from that mass of testimony (Petition, p. 37, footnote 2), the opinion as a whole demonstrates that the Court of Appeals gave careful consideration to each of Switzer's fact contentions and determined that the District Court properly decided the fact issues in favor of the judgment rather than against it. No reason is shown for departing from the rule of *Graver Mfg. Co. v. Linde Co.* (1949), 336 U.S. 271, 275:

> "* * * A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. * * *"

Petitioners do not even attempt to make this showing in their petition.

2. Switzer's question (1), forming the basis for reason 1 for granting the writ (Petition, pp. 2, 20-23), does not warrant review of the concurrent decisions below. The question is based upon the disproved factual premise that the adjudicated trademark licenses merely granted ancillary clearance under certain patents and that there was in fact no tie-in between the trade-mark license and the patent license. Both courts below rejected this contention of Switzer on the facts. The District Court, with the exception of certain label licenses, found the fact to be that "no licenses were granted to any manufacturer of end-use devices other than those patent licenses which are automatically included in the formal end-use licenses" (Appendix, p. 349). The Court of Appeals, reviewing the

entire record, concluded that "basic licenses used by appellant (Switzer) tie the right to the use of patents to the use of the Day-Glo trademark, and both to the exclusive use of Switzer produced, or Switzer approved materials." (Petition, p. 34).

When Switzer argues that "The fact that Switzer offered the trademark license and the patent license together and urged licensees to accept both does not show that it was impossible for a licensee to obtain one without the other even though Switzer preferred that they be combined." (Petition, pp. 20-21), Switzer misstates the record. The record in this case contains Switzer's own statement of its policy in a letter dated December 5, 1949. Switzer there analyzed its combination trademark-patent license and, answering an "exception to the required use of the trademark Day Glo," stated "This is not a matter of choice with us but is our duty under the trademark statutes." (Plaintiffs' Exhibit 158, Appendix, p. 222).

Further, Switzer's publicity in the trade journals positively stated that "No licenses under Switzer daylight fluorescent patents are being granted to any display makers except those patent licenses which are automatically included in Switzer trade mark and agency agreements." (Plaintiff's Exhibit 163, Appendix, p. 226). On such a record, it is idle to infer that Switzer merely preferred that the licenses be combined.

Thus, on the findings in this case, there is no conflict with, and no sound distinction can be made rendering inapplicable, the rule of *Northern Pac. R. Co. v. United States* (1958), 356 U.S. 1, because here, as there, the tie-ins were mandatory and not merely preferred.

Neither does *United States v. Loew's, Incorporated* (S.D. N.Y. 1960), 189 F.Supp. 373, support the petition because there the court recognized illegality "when representatives of the defendants refused to do business in any way other than by licensing the feature films as part of a package." (Quoted, Petition, p. 21).

United States v. Jerrold Electronics Corporation (E.D. Penn., 1960), 187 F.Supp. 545, affirmed, on other issues, per curiam (1961), 365 U.S. 567, and *Dehydrating Process Co. v. A. O. Smith Corp.* (1st Cir. 1961), 292 F.2d 653 (Cited, Petition, p. 21), do not support the petition. The Court of Appeals distinguished the two cases factually (Petition, pp. 37-39) and concluded that "There are no factors here present which are comparable to the facts of either *Jerrold* or *Dehydrating* which the courts there felt excused tie-in sales from censure." (Petition, p. 39).

Finally, two of the three trademark cases cited by Switzer (Petition, pp. 22-23), namely, *A. Bourjois & Company v. Katzel* (1923), 260 U.S. 689; and *Scandinavia Belting Co. v. Asbestos & Rubber Works of America, Inc.* (2d Cir. 1919), 257 Fed. 937, are inapposite. Neither of those cases involves an illegal use of trademarks in violation of the antitrust laws. Although *Coca-Cola Co. v. J. G. Butler & Sons* (E.D. Ark. 1916), 229 Fed. 224, involves antitrust issues, it does not involve any tie-ins between the trademark monopoly and the patent monopoly. All three cases should give way to the rule of this Court that "A trademark cannot be legally used as a device for Sherman Act violation." [*Timken Co. v. United States* (1951), 341 U.S. 593, at p. 599].

3. Question (2), forming the basis for Switzer's reason 2 for granting the writ (Switzer Petition, pp. 2, 24), in effect urges that U.S. Code, Title 35, Sections 271(c) and (d); *Mercoid Corp. v. Mid-Continent Co.* (1944), 320 U.S. 661; and *Mercoid Corp. v. Honeywell Co.* (1944), 320 U.S. 680, are not applicable because here there was no showing that Switzer's products had any substantial non-infringing use (Petition, p. 24). This Court should not be asked to review the voluminous record upon Switzer's unauthenticated representation (Petition, p. 24) that there is "no showing that petitioners' products had any substantial non-infringing use." Both courts below rejected this contention on the record. The Court of Appeals found that "the materials were suitable for substantial noninfringing uses." (Petition, p. 40). Both courts concurrently found that the fluorescent materials "have substantial non-infringing uses not defined in any" of the claims of patents 2, 417, 384 and 2, 475, 529. (Finding 14, Appendix, p. 350, Petition, p. 31). That finding was not challenged below (Petition, p. 31). It should not be challenged here.

In view of the recent restatement of the rule of the *Mercoid* cases in *Aro Mfg. Co. v. Convertible Top Co.* (1961), 365 U.S. 336, there is not even an academic interest in the question as to whether the codification constitutes "a legislative vacation of the rule of those cases." (Petition, p. 24).

4. Question (3), forming the basis for Switzer's reason 3 (Petition, pp. 2, 25-26), is partially factual and is partially legal in asking this Court to review the question of whether Radiant is entitled to recover as damages its

expenses for defending two patent infringement actions. The Court of Appeals found, "There is ample proof that appellants made excessive and reckless claims of patent infringement in the furtherance of their licensing program." (Petition, p. 35). The District Court found that Switzer instituted the two actions in question "In furtherance of the Day-Glo licensing program * * * intended thereby to deter customers and prospective customers of Radiant Color Company from purchasing fluorescent materials produced by Radiant Color Company." (Finding 18, Appendix, p. 351) and that Radiant "was put to the expense of defending" its customers in said actions (Findings 31 and 32, Appendix, p. 354).

There is no conflict with the rule of law that intent in bringing such suits in furtherance of antitrust violations does not enter into the question. The absence of malice or bad faith is immaterial. This precise issue was before this Court in the record in *Hartford-Empire Co. v. U.S.* (1945), 323 U.S. 386, affirming in part and reversing in part *United States v. Hartford-Empire Co.* (N.D. Ohio W.D. 1942), 46 F.Supp. 541. District Court Conclusion of Law 16 (Printed Record, p. 7404), which was not reversed, states:

> "16. The fact that such conspirators, in bringing infringement [fol. 14115] suits, believed that their patents were valid, dominant and infringed, is no justification for the bringing of infringement suits also motivated by a primary desire to further the ends of the conspiracy by eliminating competition in machinery or glassware, monopolizing trade and commerce in automatic glass making machinery, and stabilizing the price of unpatented glassware."

Similarly, in not giving any weight to the "without malice or bad faith" defense on the damage issue, the courts below do not break new ground as implied by Switzer, but they follow *Kobe, Inc. v. Dempsey Pump Co.* (10 Cir. 1952), 198 F.2d 416, cert. den. (1952), 344 U.S. 837. There, the court said, p. 424:

> " • • • The trial court found that Kobe did not institute the infringement action in bad faith but believed that some of its patents were infringed, and that Kobe intended to secure a judgment which would eliminate defendants as competitors and to remain in exclusive possession of the whole of the interstate markets for deep well hydraulic pumps for oil wells. The trial court also found that the infringement action and incidental activities by Kobe were intended and designed to further the existing monopolistic purposes.
>
> "We have no doubt that if there was nothing more than the bringing of the infringement action, resulting damages could not be recovered, but that is not the case. The facts as hereinbefore detailed are sufficient to support a finding that although Kobe believed some of its patents were infringed, the real purpose of the infringement action and the incidental activities of Kobe's representatives was to further the existing monopoly and to eliminate Dempsey as a competitor. The infringement action and the related activities, of course, in themselves were not unlawful, and standing alone would not be sufficient to sustain a claim for damages which they may have caused, but when considered with the entire monopolistic scheme which preceded them we think, as the trial court did, that they may be considered as having been done to give effect to the unlawful scheme."

Thus, these cases illustrate that the principles applied in *Clapper v. Original Tractor Cab Company* (7th Cir. 1959) 270 F.2d 616; and *Dairy Foods Incorporated v. Dairy Maid Products Coop.* (7th Cir. 1961) 297 F.2d 805 do not turn on the presence or absence of malice or bad faith, as Switzer urges. (Petition, p. 26).

Radiant, in conclusion, submits that the petition on No. 759 should be denied. None of the reasons suggested in Rule 19 is here present. Insofar as all of the issues are factual, no reason is shown for a review of the concurrent determinations below. Insofar as Question No. 3 may present a legal issue, Radiant submits that it is properly decided in accord with established law.

Dated, San Francisco, California,
March 28, 1962.

Respectfully submitted,

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